me Court, U. S.
FILED
AUG 12 1980
MICHAEL RODAK, JR., CLERK

No. 80-269

IN THE

Supreme Court of the United States

October Term, 1980

THE STATE OF CONNECTICUT,

Petitoner,

v.

MURRAY GOLD,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

FRANCIS M. McDONALD
State's Attorney

WALTER H. SCANLON
Chief Asst. State's Attorney

BRADFORD J. WARD
Assistant State's Attorney

300 Grand Street
Waterbury, CT 06702
P.O. Box 1245
(203) 756-4431

QUESTIONS PRESENTED

A. Is the certorari jurisdiction of this Court to be determined solely upon the Connecticut Supreme Court's statement that its reversal of the trial verdict is based upon nonconstitutional state law grounds when the state law invoked was adopted by the Connecticut Supreme Court as a result of this Court's decision in *Chambers* v. *Mississippi*, 410 U.S. 284?

B. Did the Connecticut Supreme Court correctly apply the doctrine of *Chambers* v. *Mississippi* to the facts of this case.

TABLE OF CONTENTS

Page

Table of Authorities i

Opinion Below ii

Statement of Jurisdiction ii

Constitutional and Statutory Provisions ii

Statement of the Case iii

Argument of Law 18

Conclusion 28

Appendix

TABLE OF AUTHORITIES

CASES

Page

Ashwander v. *Tenn. Valley Authority*, 297 U.S. 288 (1936) 18

Chambers v. *Mississippi*, 410 U.S. 284 (1973) 18, 19, 20

Commonwealth v. *Fishel*, 251 Penn. Sup. 528, 380 A.2d. 906 (1977) 23

Commonwealth v. *Keizer*, 385 N.E.2d. 1001 (Mass. 1979).....22

Donnelly v. *United States*, 228 U.S. 243 (1912) 20

Rescue Army v. *Municipal Court*, 331 U.S. 549 (1947).....18

State v. *DeFreitas*, Vol. XLI, No. 28, Conn. L.J. (1980).....18

State v. *Haywood*, 295 N.C. 709, 249 S.E.2d. 429 (1978) ..21, 23

State v. *Stallings*, 154 Conn. 272, 224 A.2d. 718 (1966).....18

United States v. *Atkins*, 558 F.2d. 133 (3rd. Cir. 1977)....22, fn. 7

United States v. *Bagley*, 537 F.2d. 162 (5th. Cir. 1976) .....22, fn. 7; 26

United States v. *Dovico*, 380 F.2d. 325 (2nd. Cir. 1967) 22

United States v. *Guillette*, 547 F.2d. 743 (2nd. Cir. 1976)...26, 27

United States v. *Hoyos*, 573 F.2d. 1111 (9th. Cir. 1978) 21

United States v. *Marquez*, 462 F.2d. 893 (2nd. Cir. 1972) 22

United States v. *Satterfield*, 572 F.2d. 687 (9th. Cir. 1978) .....22, fn. 7

United States v. *Sheard*, 473 F.2d. 139 (D.C. Cir. 1972) 24

MISCELLANEOUS

Rule 804(b)(3), Federal Rules of Evidence 18, 21, 23

OPINION BELOW

I. CITATION

A decision of the Connecticut Supreme Court, *State* v. *Murray Gold,* Vol. XLI, No. 47, Conn. L.J. p. 1A (May 15, 1980), a copy of which is annexed hereto. Said decision is reported as *State* v. *Gold,* ——Conn.——, ——A.2d.—— (1980).

II. JURISDICTIONAL GROUNDS

On May 15, 1980, the Connecticut Supreme Court entered judgment ordering a new trial for Murray Gold for the crime of murder. The Jurisdiction of this court is invoked under authority of 28 U.S.C. Section 1257(3).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The State of Connecticut submits this case was decided in the Connecticut Supreme Court upon the Due Process clause of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

The defendant, Murray Gold, of New York City was indicted for two counts of intentional murder. After this conviction he appealed to the Connecticut Supreme Court which reversed his conviction and ordered a new trial.

No.....

IN THE

Supreme Court of the United States

October Term, 1980

THE STATE OF CONNECTICUT,

Petitoner,

v.

MURRAY GOLD,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitoner, the State of Connecticut, respectfully prays that a Writ of Ceritiorari issue to review the judgement and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on May 15, 1980.

STATEMENT OF FACTS

I.

On Thursday, September 26, 1974, the day of Yom Kippur, at about 8:30 PM, Irving and Rhoda Pasternak returned to their home at 53 Fern Street, Waterbury in Mrs. Pasternak's Buick after dining with their daughter, Myrna Kahan, and her family. (T-1569, 1993). Shortly after 9:00 PM, Mrs. Pasternak called Myrna Kahan from the Pasternak upstairs bedroom and over the telephone Myrna Kahan heard the front doorbell ring and heard her mother tell Mr. Pasternak not to answer the bell until he saw who it was. (T-1993-1996, 2020). Within minutes, Mrs. Pasternak told Myrna that a man was yelling at Mr. Pasternak and asked Myrna to send over her husband, Dr. Robert Kahan. (T-1996). Mrs. Pasternak also told her daughter that Mr. Pasternak shouted repeatedly "get out of my house." (T-2021). Mrs. Kahan then hung up. (T-2025).

Myrna Kahan immediately called the police-fire switchboard at 9:12 PM and also asked her husband to call a friend, police Captain Arnold Mark, who lived very near the Pasternaks, and to go himself to the Pasternak house a few blocks away. (T-1495, 1496, 1996-1997, 2025-2026, 2055-2057, 2067-2068). Myrna Kahan also called her parent's next door neighbor, Fred Rubenstein, who looked out his window and reported that he saw nothing unusual. (T-1691-1701, 1997). Mr. Rubenstein saw a car in the driveway he later identified as Mrs. Pasternak's Buick and which at first he mistakenly took for a Volkswagon or smaller car through the window. (T-1702-1707). He also saw the front door porch light was on and the front door was closed. (T-1701, 1721, 1728).

Mrs. Pasternak herself called the police-fire switchboard at 9:13 PM (less than a minute after her daughter called) to report a "crazy man" at their home. (T-2062-2066, 2068-2069).

When Dr. Kahan and his son Mark arrived at the Pasternak home, Captain Mark was already there and had found Mr. and

PREVIOUS PAGE WAS BLANK

Mrs. Pasternak both dead, the victims of multiple savage knife wounds. (T-1498-1500, 1574). Mark Kahan then went to Mr. Rubenstein's house and asked Mr. Rubenstein to call the police, which he did at 9:19 PM, some seven (7) minutes, ten (10) seconds after Mrs. Kahan's call and some six (6) minutes, 36 seconds after Mrs. Pasternak's call. (T-2059-2061, 2062-2066).

The first police cruiser arrived at the Pasternak home shortly thereafter having been dispatched at 9:13 PM. (T-1828) and taking some four to six minutes to get there. (T-1633).

II.

The police found an empty bottle size brown paper bag and a discharged fire extinguisher (also bottle size) in the house not far from the front door. A residue of fire extinguisher powder in the front hallway (State's Exhibit U-9, T-2755) indicated the extinguisher had been fired into the hallway from outside the front door. (T-1499, 1513, 2774-2775). The outside porch light next to that door was lit when the police arrived and there were three windows in that door by which Mr. Pasternak could look out at his visitor before opening the door. (T-1631, 2760).

Mrs. Pasternak's small Buick automobile was parked in the driveway of the Pasternak home when Mr. Rubenstein went over to the home after the police arrived and he identified that vehicle as the vehicle he had described as a Volkswagon or small car in the driveway to Myrna Kahan. (T-1701, 1721, 1728).

A trail of blood spots led from the living room area where the fire extinguisher and paper bag were found through the living room and dining area into the kitchen where the body of Irving Pasternak lay in a large pool of blood. (T-1896-2754, 2780-2782). His upper torso, hands, and head were multilated by some 30 to 35 knife wounds suggestive of a malevolent and vicious attack. (T-1499, 1954). The site of the principal assault against Mr. Pasternak in the corner of the kitchen where his body was

found surrounded by bloody walls, could not possibly have been observed by anyone on the stairs leading to the second floor. (State's Ex. VVV, T-1499, 1631, 2757).

A trail of bloody footprints some of which displayed Cat's Paw heel marks began underneath the body of Mr. Pasternak (T-2834-2839) and ran across the kitchen floor and onto the living room rug nearest the stairs leading to the second floor and the Pasternak master bedroom where Mrs. Pasternak had been on the telephone, watching television (which was still on) and talking to Myrna Kahan when the assaults began. (T-1499, 1501, 1651, 1765-1766, State's Ex. W-1, W-5, T-1889, 1890, State's Ex. EE-1, EE-2, T-1994, 2041-2042, 2748-2749).

In the second floor bedroom, the police observed the body of Mrs. Pasternak similarly mutilated by some 25 knife wounds also suggestive of a malevolent and vicious attack. (T-1500, 1529, 1949-1954). She was on the floor near the telephone which was off the hook and buzzing, and near her left foot was her left bedroom slipper. (T-1629, 3292-3293, State's Ex. VVVV). Her right slipper was in the middle of the two joined double beds which were placed between the telephone table and the bedroom front windows overlooking Fern Street. (T-3292-3294). To the right of the body a new, bloody Buck hunting knife[1] leaned against a pair of Mr. Pasternak's shoes. Mr. Pasternak's eyeglasses which he always wore were found on the telephone table in the upstairs bedroom after the murder. (T-2893-2894).

There was no evidence of robbery or theft in the house, a large home with three floors and bedrooms on the third floor. (T-1975-1976). All the money and valuables were intact and the house was not ransacked. (T-1863-1869).

On the floor near Mrs. Pasternak's body and photographed by the police that night in close detail was observed a brownish horn-

1. This knife showed no signs of wear or use and in 1974 sold at retail for $16.00. (T-3335).

type suit button with two white plastic loops in the button holes. (T-1500, 1660-1683, State's Ex. S).

During the examination of the body and its removal from the bedroom that evening, the button was moved to an area underneath the television set against the bedroom wall and the plastic loops disengaged from the button and left on the floor. (State's Ex. S, R and T, T-1660-1683).

The day following the murders, the State Police examined the crime scene at the request of the Waterbury police and removed some items from the house. (T-1775-1785). The State Police, however, did not search the master bedroom on their hands and knees. (T-1973). The brown button was removed together with the fire extinguisher, the brown paper bag and the knife. (T-1775, 1780-1785, 1920-1921).

None of these items removed showed any fingerprints or finger ridge detail, indicating that a smooth surface such as a rubber glove was used by the killer to handle those items. (T-1780-1785). A bloody smooth finger streak on the left (down) side of the stairway and bloody finger spots on the left side of the exit through the inner and outer front doors (State's Ex. V-7, V-8, V-9, W-6, W-7) also indicated the presence of some kind of bloody smooth glove as the killer left the house. (T-1779, 1799-1800, 1890-1894). The Buck knife also showed no signs of being wiped before it was left behind. (T-1789, 1798-1799).

The Buck knife had only Mr. Pasternak's blood type (Type A) above the hilt on the handle, indicating that the victim's blood had spurted onto the perpetrator's hand. Below the hilt, on the blade of the knife, only Type O blood was discovered from which facts one could deduce that the Type O blood had not spurted onto the hand of the killer. Mrs. Pasternak had blood Type O. The bloody ridgeless finger streak on the left side of the stairway and the bloody ridgeless finger impressions all to the left side as one exited the house however were found to be only blood Type O.

The house was secured and then re-examined on September 30th. by James E. McDonald of the New Haven Crime Laboratory who removed the two plastic loops which had been previously photographed by the Waterbury Police (in the button holes) and by State Police (on the floor) on September 27th. (T-1733-1737, 1748, 2984-2989, State's Ex. V-13). In examining the floor area on his hands and knees where the body of Mrs. Pasternak was found, Mr. McDonald also found in the shag rug a very small white plastic cylinder of the same appearance as the plastic loops. (T-2884-2989). He also examined the entire house, including the Pasternak clothing and sewing boxes, and did not find any like plastic material anywhere or any clothing with missing buttons. (T-2990, 3048).

The Pasternak maid had vacuumed the bedroom on September 23rd. and cleaned and dusted the room again on the 26th. and no such button with loops had been on the floor either day. Mrs. Pasternak used needle and thread and did not use a plastic button fastening kit, according to her maid of over twenty years. T-2853-2856).

III.

On Saturday, September 28th, Lt. Bochicchio of the Waterbury Police was called to visit Anthony Perugini, a Fern Street neighbor of the Pasternaks who did not know the Pasternaks or any of their family. (T-2085, 2098-2099). Mr. Perugini told the police he had observed a man with hair on his face in a blue Oldsmobile with New York license plates watching the Pasternak house on September 23rd., at 7:30 A.M. (T-2383-2395, 2097). His sister, Kim was also on Fern Street that morning and she directly observed the man in the car whom she described to the police later as having a dark bushy mustache and a receding hairline. (T-22, 75-2282, 2292, 2299). Because of the hour and because his house had been twice burglarized, Mr. Perugini had written down the plate number on his lunch bag which he handed to Lt. Bochicchio. (T-2092-2095). Looking at the bag, Bochicchio wrote down New

York registration 833-OEB in his notes and left. (T-2163). A subsequent check that day and the following day with New York automobile registration authorities and the Newberg, New York police by telephone revealed that the registration Bochicchio recorded was for a tan Chevrolet Nova from Newberg, New York which had not been stolen on the date of the murders and which did not match the car description given by Mr. Perugini. (T-2167-2168, 2179).

Mrs. Kahan had previously informed the police that one day before Rosh Hashanah, September 16, 1974, some ten days before the murders, her ex-brother-in-law, Murray Gold of New York City, had driven to her home and inquired of his former wife, Barbara, from whom he had been divorced some eleven years and had asked if her parents still lived at the same place.[2] (T-1977-1980, 2000). The Pasternaks had lived at their present home when the Golds had been married and Myrna so told Mr. Gold. (T-1568). Mr. Gold refused Myrna's invitation to call her parents for him stating he was in Connecticut on business, was a successful stock broker working the last 10 years and had to return to New York City. (T-1981-1983, 2033-2036). After receiving directions to return to New York City, Gold left. (T-1981-1983). At the time, Mr. Gold had a mustache. (T-1984).

The brownish horn suit button and the Cat's Paw heels suggested a well dressed killer and the attack against both Pasternaks and Mr. Pasternak's repeated call to get out "of my house" suggested someone related or known to the Pasternaks. (T-2021). The police thereafter on October 2nd., asked the New York City police for background information concerning Mr. Gold. (T-2169).

The New York police reported that Mr. Gold had registered to him a 1974 blue Oldsmobile sedan with New York registration plates 833-QEB. (T-2169, 2181, State's Ex. 00). When Lt.

2. Mr. Gold's appearance had changed considerably since his divorce from Barbara Pasternak. (State's Ex. DDDD and AAA).

Bochicchio recontacted Mr. Perugini about the number Bochicchio recorded, 833-OEB, he was immediately corrected by Mr. Perugini that the correct number was 833-QEB for the vehicle he observed on Fern Street. (T-2096-2097, 2169-2172).

On October 3rd., Lt. Bochicchio and New York detectives met Mr. Gold in his apartment in Forrest Hills, Queens, and informed him of the death of his former in-laws. Despite the considerable publicity surrounding these killings, Gold indicated he did not know the Pasternaks were dead and asked if they died by accident and later if they were murdered by gunshot. (T-2352, 2361). He stated he was at home the evening of September 26th., alone, except for a visit to his parents home nearby for the Yom Kippur supper which concluded about 10:30 PM. (T-2408). However, neither the defendant or his parents testified at the trial. (Transcript of trial).

When asked about a bandage on his left index finger, Mr. Gold added that he did cut himself the night of September 26th. in his kitchen while cutting a carrot. (T-2356, 2362, 2410, 2497). He later described this incident to the police as scraping himself with a knife as he was scraping a carrot. (T-2497). Because he could not sleep, he explained he had later taken his car for a ride getting back to his apartment about 12:30AM, September 27, 1974. (T-2410). He stated he visited his doctor the next day, September 27th. concerning this wound giving, it later developed, different versions of his injury to the doctor and to his apartment house doorman. (T-2723, 2362, 2919). While with Mr. Gold when later examined, the police noted swelling under the bandage and the wound was a serious slash wound. (T-2484, 2486, 2543-2544).

Mr. Gold stated he was last in Connecticut on September 16, 1974 when he visited Myrna Kahan, and he denied being in Connecticut on September 23rd. or any day after September 16th. (T-2357-2358). He further stated he came to Waterbury seeking

out his ex-wife, Barbara Pasternak, because he was reminded of her by a woman he saw in Manhattan. (T-2406).

Mr. Gold also related to the police that he had worn a mustache which he shaved off on September 26th. (T-2500). He stated that he had this mustache for some six months before that day. (T-2727).

IV.

The police returned to Mr. Gold's apartment where he lived alone later that same night at about 3:00 AM when they observed Mr. Gold come into his apartment. (T-2358-2359, 2377). At that time, the police had a search warrant to take shoes with Cat's Paw heels and clothing missing a brown suit coat button. (T-2359).

The first search warrant was issued upon the affidavit of New York Detective O'Connell that left at the scene of the murder was a brown suit coat button which did not match any item of clothing in the Pasternak home. (Defendant's Ex. 19 for Suppression Hearing, T-2448). In the course of the search conducted by New York officers, Detective O'Connell found in a closet a button fastening kit manufactured by the Dennison Company known as the "Buttonere kit" consisting of plastic ties looped through button holes (some in yellow accessory box) with a plunger type tool (in a clear plastic box) and fastened to the clothing by use of a small plastic anchor at the bottom and top of each tie. (T-2365, State's Ex. SS and TT). The plastic ties came in a row arranged on plastic rail or "tree" which passed through the tool and were severed from the rail or "tree" by forcing them off a narrowed connecting stub. Contained in the yellow accessory box were also four brown horn suit buttons which were similar to the button left at the murder scene. (T-2365-2366, 2377-2378). These items were shown to a Waterbury Officer who was in the hallway immediately outside Mr. Gold's apartment by Detective O'Connell who stood in the doorway. The Waterbury Officer not only recognized the buttons as similar to the one left at the murder scene

but observed that the plastic ties in the kit were similar to the plastic pieces on the Pasternak bedroom floor. (T-2421-2434, 2443, State's Ex. 20 for Suppression Hearing. T-2448-2449). Detective O'Connell then returned the kit to the closet. (T-2423-2434).

Mr. Gold had signed a written consent to search his apartment when the officers first entered his apartment before the search began. This consent was not limited to the items listed in the warrant and was given by Mr. Gold after being given Miranda warnings and before being told of and given a copy of the search warrant. (T-2428-2429, State's Ex. 20 for Suppression Hearing, T-2448-2449). Before seizing the buttonere kit, however, the officers obtained a second search warrant that morning to seize the kit. (T-2360, 2366, 2423-2434). The second search warrant for the buttonere fastener kit containing the buttons was based upon the affidavit of Detective O'Connell that Sergeant Messina of the Waterbury police identified the buttonere kit plastic parts as matching items found in the Pasternak home and the four (4) buttons in Mr. Gold's buttonere kit matched the button also found at the scene. (State's Ex. 20 for Suppression Hearing, T-2448-2449).

Also taken were four pairs of shoes with Cat's Paw heels, three size 10 and one size 10½, and the floor mat of Mr. Gold's vehicle. (T-2362, 2382-2384, State's Ex. VV, WW, XX, and YY).

On October 3rd., Mr. Gold was seen driving and had parked in the garage under his apartment a 1973 blue Oldsmobile, New York Registration 833-QEB. (T-2356-2357). When the police asked to search his car, Mr. Gold, for the first time, related that during the night of September 26-27th. after he scraped his finger, he had bled in the car. (T-2363-2499). He stated he later cleaned his car with a toothbrush and burned the toothbrush. (T-2499). He, at that time, gave the officers his written consent and the keys to search his automobile. (T-2360, 2366, 2423-2434).

During the police search, Mr. Gold repeated his version of his whereabouts the night of September 26th. It was when asked if he

had been to Connecticut again on September 23rd., which he emphatically denied, and being told he had been seen there, that he then became silent. (T-2540-2541).

V.

Murray Gold and Barbara Pasternak were married but for one year in 1963 and lived together for only six months when he left her at her parents home, the scene of the murders, a home where Mr. Gold stayed with Barbara when they visited in Waterbury. (T-1609, 1976-1977, 2031-2033).

Mr. Pasternak undertook all the negotiations leading to their divorce and property settlement which occasioned extremely bitter feelings. Neither ever married again. (T-1597, 1982-1983, 2889). Except for one brief meeting with his ex-wife, Mr. Gold had had no later contact with the Pasternak family until the fall of 1974. (T-2892).

Since the divorce, Murray Gold left the engineering field in which he had a degree and engaged in stock sales for various companies. (T-1981, 2688-2697, State's Ex. JJJ). However, he did not have many accounts, had no accounts in Connecticut, and of the five years preceeding the fall of 1974, he had been unemployed for three years. (T-2688-2691, 2698-2699).

While ordinarily reporting to work at 9:30 AM each week day at a nearby Cedarhurst (New York) brokerage house during the fall of 1974, Mr. Gold did not report for work until 11:30 AM on the morning of September 23rd., a week day, the same morning Mr. Perugini testified he observed his car parked in Waterbury at 7:30 AM, some 2¼ hours away from Cedarhurst. (T-2677-2688, 2692).

Kim Perugini, now Kim Kelly, identified the defendant from her recollection of the morning of September 23rd. as the man with a "dark bushy" mustache she saw on Fern Street about 7:30 AM

the morning of September 23rd.[3] She had observed his face directly through the car windshield that clear morning and looked at it for about two minutes. (T-2241-2253, 2292-2300). She had wondered what the man whose car had New York license plates was doing there at 7:30 AM. (T-2297). On Saturday, September 28, 1974, Mrs. Kelly had also discussed seeing the man with her brother, Anthony. (T-2331-2333).

VI.

A police criminalistics expert, James McDonald, matched under the microscope the fractures on both sides of the tiny cylinder he found in the rug beneath Mrs. Pasternak's body, which was a "buttonere" bottom anchor tie. (T-2992-3000, 3167-3176). One fracture matched a fracture at one end of one loop originally found in the brown button at the murder scene and the second fracture matched the fracture end of one of the connecting stubs located on the "tree" of plastic loops in Mr. Gold's yellow buttonere kit accessory box. (T-2992-3002, 3029-3030). This match was a positive identification that at one time the cylinder and one plastic loop at the murder scene, and the stub in Mr. Gold's apartment made up a single unbroken piece of plastic and had been a buttonere loop and tie attached to Mr. Gold's buttonere rail or "tree." (T-2985-2990).

This analysis was concurred in and also photographed by Dr. John Reffner of the University of Connecticut materials laboratory who had studied fractures of plastics. Dr. Reffner also microcoated the fracture areas with aluminum to enhance their detail. (T-3182-3226).

Although the rail or "tree" of plastic loops in Mr. Gold's buttonere kit was missing some loops, one of which was matched to the anchor tie at the murder scene, no clothing with such loops had been found in Mr. Gold's apartment.

3. A hearing was held with respect to the in-court identification under the *Simmons* case before Mrs. Kelly testified before the jury. (T-2239 et. seq.).

No clothing missing any buttons or clothing with buttons similar to the four buttons in the kit had been found in Mr. Gold's apartment. (T-2476-2477).

The four (4) buttons found in Mr. Gold's kit and the one (1) button found at the murder scene were identical, being "Le Chic" buttons manufactured by Lozio of Italy. (T-3032-3033, 3111-3112). These buttons had been distributed in the United States only by Blumenthal Company and Blumenthal only sold them on sale cards of, at first, six and later, at the time of the murders, five (5) buttons. (T-3107-3112). These buttons had not been supplied with any Dennison buttonere kits. (T-3111, 3136).[4] The button at the murder scene also displayed cracks along the button holes indicating stress on the holes. (T-3033-3042).

The shoes taken from Mr. Gold's apartment were found to be a size similar to the bloody footprint impressions. (T-3042-3044).

A small amount of human blood was found on the floor mat of the Gold car. (T-2871-2873). Also found on the mat was a human head hair with the appearance of blood on it. This hair was unevenly cut at the nearest end to the head as with a knife. (T-2603-2607, 2652). The hair most probably came from the head of Rhoda Pasternak as it exhibited not only the same natural characteristics as Mrs. Pasternak's hair but also the same effects of dying and bleaching with a custom dye as did the dead woman's hair. (T-2603-2613, 2617, 2655, 2668-2675). As explained by FBI Hair Expert, Frederick Wallace, the possibility was extremely remote the hair could have come from someone other than Rhoda Pasternak. (T-2597-2603).

4. The buttonere kit up to the year 1974, was manufactured by Dennison in only two (2) versions, one the same type as was found in the defendant's apartment "a homemakers kit" with a clear top and the second a brown, leather-type case "executive kit." (T-3131-3153, 3263-3277).

It was discovered also that Murray Gold had type "O" blood, the same type blood as the spots left by the killer as he went down the Pasternak stairs and out the front doors touching the stairway wall and doors to his left. (T-2918).

VII.

The defense introduced testimony from Herbert L. MacDonell, a criminalistics consultant, who testified he could not conclude from his examination of the plastic pieces that they matched, as far as his criteria of identification was concerned. (T-3591-3603, 3636).

Mr. MacDonell had previously testified that the buttonere plastic material was too soft and elastic to allow a matching of fractured parts. (T-3607-3608, 3644, 3649). However, he admitted that coating of the material with aluminum showed such a match could be made. (T-3619, 3649, 3679, 3683). If such a match were made, he stated such would establish the positive identity of both pieces as one. (T-3686).

Mr. MacDonell also testified the four pairs of shoes taken from Mr. Gold's apartment and the bloody tile marks matched as to approximate size and heel "logo" marks. (T-3700-3701).

The defense also introduced testimony from Dr. Spain, a forensic pathologist, that the assailant of Mr. and Mrs. Pasternak would have gotten their blood on his person. (T-3705-3724).

VIII.

The defense also brought forward hearsay evidence in an attempt to show that a crazed and drunken suicide, Bruce Sanford, was responsible for these murders. (T-3446).

In November, 1976, Mrs. Dorothy Crocco first offered testimony that a photograph of Sanford, taken in 1969 or 1970 (T-3580) and showing him with a full head of hair, a mustache and full beard, "looked like" (T-3780) a man, but without any

mustache and beard, she saw for 15-20 seconds (T-3777) on Fern Street at about 9:30 PM (after dark) on September 26th. while she was there in the company of two other women and the police were arriving at the Pasternak house. (T-3561-3563).[5] Mrs. Crocco also repeatedly stated the man she saw was clean shaven without any mustache, beard or goatee. (T-3570, 3774). She identified the 1969/1970 Sanford photograph as having the same eyes, nose and hairline as the man she saw on Fern Street. (T-3774, 3572). The other features of Sanford, however, shown in a photograph of him as he appeared in 1974 with a bald head, mustache and goatee, (State's Ex. WWWW) looked different to Mrs. Crocco. (T-3573).

Mrs. Crocco also stated the man she saw did not have any blood stains on his clothing. (T-3569).

Mrs. Patricia Morrison, testified that in the fall of 1974, both before and after the murders, Bruce Sanford had a mustache and goatee and kept his head shaved bald. (T-3578, 3581). She further stated Bruce Sanford in September, 1974, did not look as he appeared in the 1969/1970 photograph shown to Mrs. Crocco. (T-3577).

Police Officer Conway who had Sanford in custody at about 10:30 PM on the night of the murders after Sanford attempted suicide at his ex-wife's house also testified that Sanford had a mustache, a goatee and was completely bald in the hospital that night. (T-3790-3793). No witnesses were produced that at the time of the murders or any other time in September, 1974 was

5. The identification of the photograph was effected in this manner. In November, 1976, some 2 years after the murders, Mr. Ferrante brought a newspaper photograph of Bruce Sanford to Mrs. Crocco. This photograph was of the face of Mr. Sanford showing a full beard, mustache and long hair, and only contained Mr. Sanford, Mrs. Crocco stated the photo looked like the man except the man she saw had no mustache, goatee or beard. No other photographs were shown to Mrs. Crocco of Mr. Sanford or other individuals at the time. This same photograph was used during Mrs. Crocco's testimony. (T-3563, 3566, Defense Ex. 42).

Sanford without a mustache and a goatee and that he had hair on his head. (Record of trial testimony).

The two women who were with Mrs. Crocco on Fern Street also disputed her testimony that the man resembled Sanford. (T-3800-3804, 3815-3820). Both also testified the man was clean shaven and had no blood spots on his clothing. (T-3802-3808, 3827, 3833).

The trial judge refused to admit the out-of-court threats and confessions of Bruce Sanford (T-3555) but did give the defense the opportunity to present Mrs. Crocco's testimony to the jury. (T-3857-3868). However, defense counsel called Mrs. Haight and Mrs. Walk, who had contradicted Mrs. Crocco, to testify before the jury and did not call Mrs. Crocco. (T-3931-3952).

ARGUMENT OF LAW

I.

The Connecticut Supreme Court, referred to this Court's policy of strict necessity in disposing of constitutional issues and eschewed any constitutional basis for its own decision. *State* v. *Gold, supra,* p. 7A. The Connecticut Court cited Justice Brandeis' opinion in *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288 (1936) concerning certiorari jurisdiction of this Court, adopted in *Rescue Army* v. *Municipal Court,* 331 U.S. 549 (1947) to the exercise of this Court's jurisdiction and referred to Professor Bickel's description of this Court as "The Least Dangerous Branch" in so doing.

The Connecticut court stated it based its decision on "our statement against penal interest" or "the Connecticut rule" adopted in *State* v. *DeFreitas,* ——Conn.——, ——A.2d.——, Vol. XLI, No. 28, Conn. Law Journal, p. 1, *State* v. *Gold,* supra, p. 4A, 7A. In the DeFreitas case, however, the Connecticut Supreme Court specifically stated its prior rule prohibiting third party declarations against penal interest in evidence, *State* v. *Stallings,* 154 Conn. 272, 224 A.2d. 718, was "unconstitutional" under *Chambers* v. *Mississippi,* 410 U.S. 284, and there adopted a rule similiar to Federal Rule of Evidence 804 (b) (3).

The Connecticut Supreme Court said in *DeFreitas* at page 7:

> "Thus, since *Chambers* v. *Mississippi,* 410 U.S. 284, holds that trustworthy third party declarations against penal interest which exclupate the accused and are critical to his defense cannot be excluded as hearsay in mechanical fashion when the declarant is unavailable for cross-examination; *State* v. *Stallings, supra;* is *unconstitutional* and must be overruled insofar as it excludes evidence of reliable third party declarations against penal interest, exclupatory to a defendant. [Emphasis supplied].

This rule was described as "consistent with *Chambers* v. *Mississippi*, 410 U.S. 284" in the Connecticut Supreme Court decision in this case. *State* v. *Gold, supra* at p. 4A.

In applying the doctrine of *Chambers* v. *Mississippi*, 410 U.S. 284, as a state rule of evidence in Connecticut, the Connecticut Supreme Court decided this case upon a federal constitutional issue. In *Chambers*, this Court held that the due process clause of the Fourteenth Amendment to the United States Constitution was violated by the trial court's refusal to allow the third party declarations in evidence. In that case, a majority of this Court found Chambers had made an adequate effort to raise his federal constitutional claims in the Mississippi Supreme Court thereby giving this Court jurisdiction even though the Mississippi Supreme Court had been silent on the federal issue. 410 U.S. 284, 291, note 3. Justice Rehnquist disagreed that this Court had jurisdiction and Justice White expressed his doubts although he concurred. In his concurring opinion, Justice White pointed out that this Court had the power to ultimately decide whether a federal constitutional question was the basis for a state court decision. Thus, the State of Connecticut submits, that the Connecticut Supreme Court decision in this case was based upon a federal constitutional issue which was specifically addressed by this Court in *Chambers* v. *Mississippi, supra.*

In the past, this Court has detected a federal constitutional issue even where a state court stated it was deciding the case on state law grounds. Recently, some state courts have begun to broaden the accused criminal's rights under state law grounds which are based upon the federal constitution. This court should be as astute to detect the federal constitutional issue in these circumstances as where it is claimed a defendant's constitutional rights are violated.

II.

The State further submits that the Connecticut Supreme Court misapplied the doctrine of *Chambers* v. *Mississippi* in this case.

The Connecticut Supreme Court held that the alleged hearsay declarations of Bruce Sanford should have been admitted into evidence. Those alleged declarations were essentially four (4) in number, (1) being Sanford's earlier threat "to get" Mr. Pasternak in the mistaken belief Pasternak represented Glorianna Sanford,[6] (2) his phone call of 1:00 AM on September 27th. stating he was covered with blood and had done something he could not get out of, (3) his December 1974 confession while intending to commit suicide that he was sorry he had to kill "Rhoda" or Mrs. Pasternak. (T-2453-3456, 3497-3514) and (4) Sanford's statement to Anthony Borrelli the morning after the murders that other required more stiches that he did and he squared away people what were involved with his wife.

The Connecticut Supreme Court so held following the rule it considered mandated by the *Chambers* case. However this ruling was not mandated by *Chambers* as the declarant in *Chambers* was available for cross-examination under oath. In the words of Justice Powell at 35 L.Ed.2d. 312:

> "The availability of McDonald (the declarant) significantly distinguishes this case from the prior Mississippi precedent, *Brown* v. *State, supra* and from the *Donnelly* type situation since both cases the declarant was unavailable at the time of trial."

Also, in *Chambers* a witness was produced who testified he saw the declarant, who was once arrested for the murder, actually shoot the victim. (35 L.Ed.2d. 305).

6. Mrs. Morrison testified that Sanford threatened to get Mr. Pasternak because Mr. Pasternak was representing Glorianna Sanford and was selling her out. (T-3453-3457). However, Glorianna Sanford did not know Mr. Pasternak and the defense counsel stated Mr. Pasternak was not "in reality" Mrs. Sanford's lawyer but that Bruce Sanford was subject to "delusional fits." (T-3445-3519).

With respect to mandating this result "under other circumstances" where the rule excluding some declarations against penal interest might serve to exclude untrustworthy testimony, this Court expressly refrained from deciding that issue.

As to the first two declarations allegedly made to Patricia Morrison over the telephone, neither contains any admission to the murders of Irving and Rhoda Pasternak. They should not qualify as declarations against penal interest. In *State* v. *Haywood,* (N.C. 1978) 249 S.E.2d. 429, 442, the North Carolina Court pointed out that the declaration "must be an admission that the declarant committed the crime for which the defendant is on trial." Sanford's second declaration was consistent with his suicide attempt of September 26th. and contained no admission of the Pasternak murders. In fact, in a tape recorded interview Mrs. Morrison first gave to defense counsel, she stated Sanford told her he was covered with blood because he accidentaly cut himself. (T1-3/23/76, p. 91-93).

The test for allowing the admission of third party declarations against penal interest under Rule 804 (b) (3) has been defined as follows: whether the statement so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true and whether the corroborating circumstances clearly indicate the trustworthiness of the statement. ***United States*** v.*Hoyos,* 573 F.2d. 1111, 1115.

With respect to the first prong of the test, the declarations must, "in a real and tangible way subject the declarant to criminal liability". ***United States*** v. *Hoyas, Supra,* 1115.

The United States Court of Appeals for the Second Circuit in a pre Rule 803 (b) (3) case while observing the trend was toward admissibility of such declarations said that "even a broadened penal interest exception must have some boundaries and must be limited at least to statements admitting a particular crime for which prose-

cution is possible at the time. *United States* v. *Dovico,* (2nd. Cir. 1967) 380 F.2d. 325, 327.

As pointed out in *United States* v. *Marquez,* 462 F.2d. 893 (2nd. Cir. 1972) statements, other than those "admitting a particular crime" lack the "inherent reliability" which justified the exception to the hearsay rule.

Some Circuits and State courts have followed a broader definition of a declaration against penal interest. Cf. *Commonwealth* v. *Keizer,* (Mass. 1979) 385 N.E.2d. 1001, 1005, note 8. The Connecticut Supreme Court went even further under its penal interest rule adopted in light of *Chambers* v. *Mississippi* and held admissible "remarks which would tend to incriminate the declarant were he or she the individual charged with the crime."

This rule goes beyond the rationale of *Chambers* and the *Federal Rules of Evidence* and leaves far behind the "inherent reliability" which justified the exception to the hearsay rule fashioned in the *Chambers* case. It is abundantly unfair to the prosecution as is shown by the circumstances of this case.

The third alleged declaration made again over the telephone to one Bourassa, an often convicted felon (T1-3/16/76, p. 79-80) and allegedly overheard by one Yashenko,[7] does contain a direct admission of killing Mrs. Pasternak or "Rhoda." (T-3479-3485, 3497-3504, 3511-3514). However, this declaration lacks the element of the declarant's actual immediate jeopardy of per-

7. As this case was on appeal, Bourassa was sentenced in the Superior Court Waterbury on 24 counts of burglary and larceny involving young men of Yashenko's age. Cf. *U.S.* v. *Bagley,* 537 F.2d. 162, 168 (5th. Cir. 1976), *U.S.* v. *Satterfield,* 572 F.2d. 687, 692 (9th. Cir. 1978). But see *U.S.* v. *Atkins,* 558 F.2d. 133, 135 (3rd. Cir. 1977).

sonal liberty and his understanding of that potential, given that Sanford was in the process of committing suicide.

As pointed out in the cases, the guarantee of truth in statements against interest is the declarant's conscious statement of fact even though it be "to his own hinderance." This psychological assurance of reliability is the whole theory of admissibility of such statements in the absence of the oath and the opportunity to cross-examine. To be properly admissible, therefor, under this theory the declarant's statement should be made to one in authority or in an adversary position (Cf. *Commonwealth* v. *Fishel,* 380 A.2d. 906) and in such circumstances that a reasonable man would apprehend his vulnerability to penal consequences which are not too remote. The *Haywood* case also points out the declaration "must have had the potential of actually jeopardizing the personal liberty of the declarant at the time it was made and the declarant must have understood the damaging potential of his statement."

These conditions were not met in Sanford's alleged telephone calls. He had no intention of furnishing evidence to be used against himself. If the testimony of Bourassa and Yashenko is to be credited it must be believed that Sanford was intent on taking his own life as he made his admission. He was thus beyond considering his possible prosecution for the crime and no real or tangible possibility of prosecution then existed.

The Connecticut Supreme Court however, made the contemplated suicide a factor which was indicative of the reliability of the admission. Unless, this Court in deciding *Chambers* and adopting Rule 803 (b) (3) desired to create another exception to the hearsay rule for statements made by those about to commit suicide, it is submitted again that the Connecticut Supreme Court mis-

applied this circumstance to the exception to he hearsay rule that was cited.

The evidence also showed that Sanford would confide in Mrs. Morrison as a friend and that she would not breach that confidence especially to the police. (T1-2/23/76, p. 28-29, 50-51, 54, 61, 94-96, 106). The reason Mrs. Morrison gave for not bringing forth the information for over a year after the murders and Sanford's suicide was that Mrs. Morrison was a friend of Sanford and did not want to hurt him. (TBH-297).

Since the declarations were alleged to have been made over the telephone to Mrs. Morrison there is no evidence of Sanford's condition, whether drunk or sober or under the influence of drugs, except that he was very excited. However, Sanford's long history of mental instability does not suggest that he was a reasonable man capable of understanding the potential of any of his statements. (T1-3/17/76, p. 57-112). His misapprehension that Mr. Pasternak represented Glorianna Sanford illustrated that mental instability. Cf. Footnote #6.

Sanford was not sound of mind at the time of the alleged call to Bourassa, as he was about to take his own life after a series of suicide attempts and he had a long history of mental instability. (T1-82-83, Dr. Kovel). At that time, he was simply unconcerned about possible imprisonment, and far from rational.

In *United States* v. *Sheard,* (D.C. Cir. 1972) 473 F.2d. 139, 149, the declarant's unsound mental state was one factor which lead the court to exclude a profered statement, as the trustworthiness of the emission was called into question.

The *Chambers* rule provides that the corroborating circumstances indicate the trustworthiness of the statement. In this case

even simple corroboration of the statements, which would not satisfy the rule, was not shown. There was no physical evidence which linked Sanford to the murder scene. In fact, the evidence later showed Sanford could not have left the bloody tracks in the Pasternak house since Sanford never had Cat's Paw heels on any of his shoes. (TBH-557-564).

The evidence of Dorothy Crocco did not establish the trustworthiness of Sanford's alleged statements. Mrs. Crocco testified she saw a man who looked like an old photograph of Sanford on Fern Street on the night of the murders. However, she testified that the man she saw had no mustache or goatee and Sanford affected both a mustache and goatee before and immediately after the murders. (T-3777, 3578-3581, 3790-3793). Her testimony was further weakened by the fact she was led to identify the only one photograph shown her two years after the murders in which Sanford wore a full head of hair, a large mustache and a full bushy beard. (T-3563-3566, Defense Ex. 42). Her identification was further undermined by her testimony that the man she saw had long flowing hair as he ran by her and could not be wearing a toupee. (T-3565). At the time of the murders, Sanford shaved his head completely bald and he owned no wigs. (T-3578-3581, 3790-3793, TBH-569-570). Mrs. Crocco's testimony failed to connect the Bruce Sanford of 1974 to the murders. With the testimony of Mrs. Haight and Mrs. Walk, Mrs. Crocco's testimony also establishes the man observed on the street was not spotted with blood. The defense expert, Dr. Spain, had testified in his opinion the killer would have been "splashed" by the victims' spurting arteries. The murder scene itself revealed the killer left bloody footprints and bloody marks on the stairway and the front doors as he left the murder scene.

The confession declaration itself does not clearly indicate its reliability. Sanford is alleged to have stated "he was *sorry to have to kill*" Mrs. Pasternak or "Rhoda." The facts and circumstances

of the murders indicate the killer determined to viciously and malevolently kill both Irving and Rhoda Pasternak when he entered the house. He had no way of knowing who would answer the door, Irving or Rhoda Pasternak, but he had determined and planned to begin his deadly assault at the door. The killer only left the single murder weapon behind after he had killed Mrs. Pasternak. He had gone directly from the killing of Mr. Pasternak to the killing of Mrs. Pasternak and accomplished both murders in less than seven minutes.

The murders were not a random crazy assault by a drunken indigent upon a mistaken enemy and the regretful killing of his wife. The crimes had the earmarks of a carefully planned execution of both Pasternaks following a surveillance of their activities and home by one who knew the layout of the home and the habits of the Pasternaks. The killer, in a manner uncharacteristic of Sanford, would have to carefully assemble the murder tools and plan his entry into the house by adopting the guise of a visitor with a liquor bottle. He would have to be sure he met no one else in the house as he left without his knife.

Thus, Sanford's alleged confession not only lacked specific and unknown details of the crimes which might add to its reliability, but itself contained an element that showed it to be unreliable.

In this case the witnesses came forward a year after the murders and after Sanford was long dead. This delay made the task of establishing the truth of their testimony very difficult. It also made their testimony suspect and militated against its trustworthiness.

United States v. *Bagley*,
(5th Cir. 1976) 537 F2d
162, 167

United States v. *Guillette*
Supra, at page 754

Since the *Chambers* case was the basis of the
rule it does serve as a suitable benchmark for the admission or third party declarations of criminal responsibility for the crime. In the *Chambers* case the declarant was present at the scene of the murder, immediately confessed and there were eyewitnesses to his shooting the deceased.

In *United States* v. *Guillette, supra* using such a benchmark the Second Circuit upheld the discretionary action of the trial judge in excluding a third party confession. There the Second Circuit considered the unreliability of the declarant's condition when he made the statement (he had been drinking), the time elapsed between the occurrence and the confession (four months), the lack of corroborating detail in the confession and independent evidence tying the declarant to the crime.

In this case, the declarant was not rational when he allegedly made his confession some two months after the murders, gave no corroborating details in his confession and no independent evidence linking his to the crimes was produced. In addition, the witnesses to both the alleged confessions and threats waited over a year and after the death of Sanford to come forward with this information concerning these well publicized and shocking murders.

It is respectfully submitted that the Connecticut Supreme Court misapplied the doctrine of *Chambers* v. *Mississippi* to reverse this conviction.

CONCLUSION

The admissability of alleged third party declarations against penal interest presents a very real and substantial problem under the due process clause. In many serious cases, the adoption of a rule under this court's ruling in *Chambers* v. *Mississippi* which goes far beyond that holding and allows such testimony as appears in this case would have a far reaching and determintal effect upon efforts to enforce the criminal law. The ruling in this case in effect destroys the hearsay rule when evidence is offered against the State. The unfairness of such a rule and its effect upon the public safety must be apparent. Thus, the State of Connecticut looks to this Court to give guidance to the Connecticut Supreme Court and other courts to remedy this unfairness.

THE STATE OF CONNECTICUT

F. McDONALD

W. H. SCANLON

BRADFORD WARD

APPENDIX

INDEX TO THE APPENDIX

Page

Decision of the Connecticut Supreme Court 1A

SUPREME COURT

November Term, 1979

STATE OF CONNECTICUT *v.* MURRAY R. GOLD

COTTER, C. J., LOISELLE, BOGDANSKI, SPEZIALE and PETERS, Js.

Argued November 15, 1979—decision released May 15, 1980

Indictment charging the defendant with two counts of the crime of murder, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Saden, J.;* verdict and judgment of guilty and appeal by the defendant. *Error; new trial.*

Louis Nizer, of the New York bar, with whom were *Timothy C. Moynihan* and, on the brief, *Francis M. Donnarumma* and *Kenneth Schluger,* for the appellant (defendant).

Francis M. McDonald, state's attorney, with whom were *Walter H. Scanlon,* chief assistant state's attorney, and *Richard L. Shiffrin,* assistant state's attorney, for the appellee (state).

SPEZIALE, J. On October 15, 1974, a grand jury in the judicial district of Waterbury returned a true bill comprised of two counts, indicting the defendant, Murray Gold, for the murders of Irving and Rhoda Pasternak, his former in-laws, on September 26, 1974.[1] On March 31, 1976, the defendant's first trial ended in a mistrial, when the jury was unable to reach a verdict. After a second trial, the defendant was found guilty of both murders, and on

[1] Gold had been married for a brief period of time to Barbara Pasternak. At the time of the murders the couple had been divorced for approximately eleven years.

January 26, 1977, he was sentenced on each count to a term of not less than twenty-five years nor more than life at the Connecticut correctional institution at Somers, with the sentences to be served concurrently.

The charges against the defendant arose out of the violent deaths of Irving and Rhoda Pasternak on the evening of September 26, 1974. After dining with their daughter, Myrna Kahan, and her family on September 26, the Pasternaks returned to their home at 53 Fern Street, Waterbury, at approximately 8:30 p.m. At about 9 p.m. that same night, Mrs. Pasternak telephoned Myrna Kahan from the upstairs master bedroom. While the two were conversing on the telephone, the doorbell at the Pasternak home rang. Mrs. Kahan heard her mother caution Mr. Pasternak not to open the door until he saw who was there. A short while later Mrs. Pasternak's voice changed and became excited. She told Mrs. Kahan that she heard Mr. Pasternak say "Get away from me. Get out of my house" and she instructed her to send Dr. Kahan, her husband, "over here fast." Immediately Mrs. Kahan called the emergency 911 telephone number. It was 9:12 p.m. On another telephone located in his home, Dr. Kahan immediately called a Waterbury police officer, Arnold Mark, who was related to the Pasternaks through marriage, and asked him to go to the Pasternak home, which was located a few blocks from where Mark lived. At 9:13 p.m. Mrs. Pasternak, herself, called the emergency 911 number to report a "crazy man" at their home. Mrs. Kahan telephoned the Pasternak's next door neighbor, Fred Rubenstein, who, at Mrs. Kahan's request, looked out a window of his house and observed the Pasternak home. Rubenstein reported that he saw nothing unusual; he said that he saw a car parked in the Pasternak driveway, which he described to Mrs.

Kahan as possibly a Volkswagon or some smaller car, but which he later identified as the Pasternaks' car. He also indicated that the porch light at the front door was lit.

Mark arrived at the Pasternak home within one and one-half minutes after he was called by Dr. Kahan at approximately 9:12 p.m. Mark observed Mr. Pasternak lying on the floor in the kitchen, his body covered with blood and mutilated by approximately thirty-five knife wounds. Upstairs he found Mrs. Pasternak dead in the master bedroom; she had been stabbed approximately twenty-five times. In the room he also saw a "Buck" hunting knife covered with blood, which was leaned against a pair of Mr. Pasternak's shoes. As Mark was descending the stairs, Dr. Kahan and his son ran into the house; the son was sent to call an ambulance at a neighbor's home. He went to see Fred Rubenstein, who called the 911 police emergency number at 9:19 p.m., some seven minutes, ten seconds after Mrs. Kahan's call and some six minutes, fifty-four seconds after Mrs. Pasternak's call.

Aside from the knife found by Mark, other evidence found in the house included an empty bottle-size brown paper bag and a discharged fire extinguisher, which were discovered in the vicinity of the front foyer and living room. A residue of powder was found on the fire extinguisher, on the oval-shaped mirror in the foyer, on the wall near the mirror, and on the living room rug. A trail of bloody footprints, some of which displayed Cat's Paw heel marks, led from the body of Mr. Pasternak to the foyer and stairs leading to the second floor. In a pair of blue trousers hung over a chair in the Pasternak master bedroom, $1174 was found. There was no evidence of robbery or theft. All money and

valuables were intact and the house was not ransacked.

During investigation by the Waterbury police department a button was photographed in the master bedroom. It was photographed first on the center of the floor between the doorway and the bed and later on the floor near the television. In the first photograph the button had two white plastic loops in the buttonholes; in the second photograph the loops were on the floor a distance of two feet from the button. Mark, the first person to arrive at the Pasternak home, testified that he saw a dark button near the television set in the master bedroom. On September 27, 1974, the day after the murders, trooper Henry Maynard of the Connecticut state police made a sketch of the crime scene, including the master bedroom. He did not see a button in that bedroom, and a button was not initially included in the sketch. A day or two later, however, Maynard added a button to the sketch, but did not remember at whose direction. The subsequent state police investigation also produced numerous latent finger and palm prints; a total of twenty-seven prints were identified; one palm print and eight fingerprints which were identifiable were not identified. Neither the paper bag, the fire extinguisher, the knife handle, nor the button showed any identifiable fingerprints, palm prints, or finger ridge detail. From the evidence he observed at the crime scene, trooper Luneau, the Connecticut state policeman who was in charge of the latent fingerprint section of the forensic laboratory, was of the opinion that the assailant wore gloves. None of the prints identified matched those of Murray Gold.

James McDonald of the New Haven crime laboratory testified that as a result of his reexamination of the Pasternak house on September 30, 1974, he

found two white plastic loops on the floor of the Pasternak master bedroom. He also testified that he removed from the blue shag rug in the master bedroom a small white plastic cylinder having the same appearance as the two plastic loops. McDonald identified these items as being parts of plastic that come with buttoneer kits. A buttoneer kit which the state claimed was seized from the defendant's New York apartment was admitted into evidence. From tests he conducted, McDonald concluded that the plastic pieces he had found in the Pasternak bedroom had been attached to the stubs left on the "base tie" in the buttoneer kit allegedly seized from Gold's apartment.

On appeal the defendant has raised numerous claims. Our ruling concerning declarations against penal interest is dispositive and mandates a new trial. Nevertheless, we address other issues that would be likely to arise at retrial.

I

Declarations Against Penal Interest

A. defendant's offer of proof

The defense attempted to introduce certain evidence in order to raise the possibility that one Bruce Sanford, who had committed suicide on December 10, 1974, committed the Pasternak murders. This evidence included alleged statements by Sanford against his penal interest, identification testimony by Dorothy Crocco, testimony regarding the activities of Sanford on the date of the murders and subsequent thereto, and testimony as to physical evidence claimed to link Sanford to the crimes. More specifically, in a hearing outside the presence of the jury, the following testimony was elicited: Glorianna Sanford, the wife of Bruce Sanford, testified that on September 26, 1974, the day of the

Pasternak murders, Sanford had been drinking and was "kind of plastered" and "without expression." When his wife told him that she couldn't allow him to behave in this manner in front of the children, he walked into the bathroom and when he emerged, he had cut his throat. The following day, September 27, 1974, Sanford and his wife drove to Florida.

Patricia Morrison testified that she had been a friend of Bruce Sanford for twenty years. On September 24, 1974, two nights before the murders, she received a telephone call from Sanford. He was very upset about Mr. Pasternak. He had told her, "The bastard is representing my wife. He's telling her things and I think he's gonna sell her out." Morrison also stated that Sanford told her that if his wife "didn't get what she had coming to her from this hearing, that he would get the no good Jew bastard one way or the other," and that he went on and on swearing about Pasternak until she got him calmed down about it. On September 26, 1974, the night of the murders, Sanford called Morrison late in the evening, possibly after 1 a.m. He told her he needed her help, and that he had "just done something that he wasn't gonna be able to get out of." When she asked him where he was, he replied, "I'm in a phone booth. I'm covered with blood." He asked Morrison to help him get out of the state. She refused.

Robert Bourassa, who had been a friend of Sanford's for approximately a year before Sanford's suicide, testified that on the night of the murders, September 26, 1974, he and a friend, Craig Yashenko, went to Sanford's home at approximately 8 p.m. as a result of a telephone call from Glorianna Sanford. When they arrived she told them that she could not find Sanford, and she wanted Bourassa to go through the house with her to find him. Sanford

could not be located. Later that evening Bourassa and Yashenko returned to the Sanford home. In the basement Glorianna showed both of them a blue denim shirt covered with blood.

Bourassa last spoke with Sanford on December 10, 1974, the night Sanford committed suicide. Sanford had telephoned Bourassa and had stated that he was going to kill himself, that he could not stand living, that he was going to get caught, that he was sorry for what he did, and that he was sorry for killing Rhoda.

Yashenko gave testimony substantially in accord with that of Bourassa. He also testified that he was on an extension line when Sanford called Bourassa in December of 1974 and that he heard Sanford say, inter alia, that he was sorry that he had to kill Mrs. Pasternak.

Anthony Borrelli, who was a member of the same motorcycle club as Sanford, testified that on the morning of September 27, 1974, the day after the Pasternak murders, he saw Sanford with stitches on his throat. When asked by Borrelli what he had been doing, Sanford replied that he had been "squaring away [with] people that were fucking with his wife." In response to Borrelli's query about where he had gotten the stitches, Sanford said that he "knows some people that could use more stitches than he got."

At the conclusion of this offer of proof, defense counsel argued for the admissibility of the Sanford-related evidence and urged the court, inter alia, that the types of evidence offered needed to be kept separate; that is, that evidence "factual in nature" needed to be distinguished from the claimed excep-

tions to the hearsay rule.[2] The trial court ruled inadmissible the "testimony in connection with the alleged confessions . . . of one Bruce Sanford" and, thus, excluded in toto the evidence set forth above. An exception was duly noted.

Stating that "if further evidence developed that would tie in Mr. Sanford to this crime even more closely than we think he is tied in now, we hope we can renew the motion," defense counsel then sought to introduce additional evidence claimed to link Sanford to the Pasternak murders, including a witness who it was claimed would be able to make an identification. Over the defendant's objection, this testimony, too, was heard outside the presence of the jury: Dorothy Crocco testified that during the evening of September 26, 1974, she was visiting friends, Mr. and Mrs. Walk, who were living on Fern Street, Waterbury, the street on which the Pasternaks lived. When another friend, Mrs. Haight, arrived between 9 and 9:30 p.m., they went out to meet her. Seeing a lot of commotion on the street, as well as several police cars arriving, they walked down the street. A man came running toward them on the side of the street opposite from that on which the Pasternaks lived. Crocco described the man as approximately six feet tall and as being in his late 20s or early 30s. Crocco identified a photograph of Sanford as the man she saw running toward her, and stated that he was

[2] "Mr. Kunstler: Judge, we are going to be quite clear. There are various aspects of the testimony you have heard today that — one aspect is the question of a confession or admission. That is in a different category to things that are associated with the res gestae in this case, and things which are purely physical in nature. The possession of a blood-stained shirt is a physical act and not a question of any statements. I think your Honor has to carefully keep these separate. At least we have to be careful in keeping separate those things which are factual in nature and those things which are exceptions, we claim are exceptions to the hearsay rule. They are all mixed up in this offer of proof."

clean shaven the night of September 26, and that the wind was blowing through the hair on his head. She stated that he almost knocked her down. Further, Crocco indicated that she did not see where he came out of, but that he was "running like the devil."

Subsequent to the Crocco testimony, defense counsel sought to "reopen" the court's decision excluding the evidence concerning Bruce Sanford, and again attempted to distinguish between the hearsay and nonhearsay evidence.[3] Defense counsel's request to have the Sanford-related evidence heard by the jury was denied. The trial court ruled the statements against penal interest inadmissible, citing *State* v. *Stallings,* 154 Conn. 272, 224 A.2d 718 (1966), and *State* v. *Marshall,* 166 Conn. 593, 353 A.2d 756 (1974). The trial court noted, inter alia, that "even if [it] were inclined to follow the Federal rule," the Sanford-related evidence did not "measure up to" the requirements of rule 804 (b) (3) of the Federal Rules of Evidence. From the trial court's

---

[3] "Mr. Kunstler: I don't think you understand my question, Judge. We'd like to call in our case Glorianna Sanford to testify only to the relationship between the Sanford . . . family [and] the Pasternaks and the Kahans, to call Craig Yashenko and Robert Bourassa as to seeing a bloody shirt, what appeared to them to be a bloody shirt that evening in the Sanford home, call the three women that we have here to testify as to what they saw that night. I'm asking you whether you're excluding that as independent evidence, independent of any statements, confessions or any other aspect.

We are offering those not to prove statements or confessions, although we take an exception to your ruling on that part. We are offering it as direct evidence to go with the fact that a person was running from the scene of the crime . . . . I'm not offering that for hearsay purposes, just what they saw that night and what Glorianna Sanford testified here . . . none of which has anything to do with hearsay but has to do with observations and direct evidence. We are offering them."

statements, set forth in the footnote,[4] it is evident that the trial court reached and decided the issue of whether the proffered testimony met at least the threshold level of trustworthiness required in the federal courts. The nonhearsay evidence relating to Sanford was ruled inadmissible because the trial court found "no relevancy." Again, an exception was taken. The defendant was permitted, however, to introduce only evidence that an unidentified person was running or walking swiftly from the vicinity of the crime scene. Thus, none of the testimony specifically relating to Sanford was heard by the jury.

On appeal the defendant claims that the trial court committed reversible error in its evidentiary ruling excluding all Sanford-related evidence. He also claims that the exclusion of this proffered testimony denied him his constitutional "right to defend and his right to due process of law."

B. THE CONNECTICUT RULE

In *State* v. *DeFreitas,* Conn. (41 Conn. L.J., No. 28, p. 1) (1980), we overruled *State* v. *Stallings,* supra, and its progeny to the extent that they held

[4] "The Court: Well, the Court's ruling is that the evidence does not change the Court's previous ruling with reference to the admissibility of the proffered hearsay confessions either under the Connecticut law, as set forth by the Connecticut Supreme Court in the cases I have already cited, including, of course, *State* against *Marshall* in 154 Conn., nor does it even measure up to the requirements of the Federal rule 804 (b)(3), the last sentence of which reads as follows — not to mention some other previous requirements in the rule — but the last sentence reads: 'A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.' I don't think that this additional evidence adds anything to the corroborating circumstances that clearly indicate any trustworthiness of the statement, even if the Court were inclined to follow the Federal rule, nor does it comply with the rationale of cases such as *State* against *Larsen,* in 415 P.2d 685, a 1966 Idaho case."

inadmissible on policy grounds all statements against penal interest exculpatory to the defendant. We adopted a rule, consistent with *Chambers* v. *Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), and in accord with rule 804 (b) (3) of the Federal Rules of Evidence, providing that trustworthy third-party statements against penal interest exculpatory to the defendant[5] are admissible if the declarant is unavailable. *State* v. *DeFreitas*, supra, 7, 8. As we noted in *DeFreitas*, supra, 8, the Connecticut rule requires, as does rule 804 (b) (3) of the Federal Rules of Evidence, that the trustworthiness of a third-party declaration against penal interest be examined carefully.[6] Rule 804 (b) (3) of the Federal Rules of Evidence requires that "corroborating circumstances clearly indicate the trustworthiness of the statement" before the statement is admissible to exculpate the accused. This grants the defendant a fair opportunity to defend against the state's accusations, retains the integrity of the jury as a finder of fact and judge of credibility, and does not seriously handicap the administration of justice. See *State* v. *Gervais*, 317 A.2d 796, 802 (Me. 1974).

---

[5] A statement exculpatory to a defendant is one which either exonerates or which might reduce the degree of punishment to which the defendant might be exposed even if the remark does not completely exonerate the defendant. See *Brady* v. *State*, 226 Md. 422, 174 A.2d 167 (1961), aff'd sub nom. *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[6] It should be noted that we specifically rejected in *State* v. *DeFreitas*, Conn. (41 Conn. L.J., No. 28, p. 1) (1980), the rule adopted by jurisdictions such as Florida, Michigan, New York, California, and Hawaii, under which a declaration against interest is admissible without a threshold showing of trustworthiness. *State* v. *DeFreitas*, supra, 8 n.9; *Baker* v. *Florida*, 336 So. 2d 364 (Fla. 1976); *People* v. *Edwards*, 396 Mich. 551, 566, 242 N.W.2d 739 (1976); *People* v. *Brown*, 26 N.Y.2d 88, 257 N.E.2d 16 (1970); *People* v. *Spriggs*, 60 Cal. 2d 868, 389 P.2d 377 (1964) (en banc). See also *State* v. *Leong*, 51 Hawaii 581, 465 P.2d 560 (1970).

1. Admissibility of the Sanford Declarations

Bruce Sanford committed suicide on December 10, 1974, and hence was unavailable at the time of trial. Therefore, the questions remaining to be considered are whether the confession to Bourassa, and overheard by Yashenko, and the statements to Borrelli and Morrison constituted declarations against penal interest and whether the threshold level of trustworthiness was satisfied.

a. Confession

Sanford's statement to Bourassa that he was "sorry he had to kill Rhoda" was unquestionably against his penal interest; it was a confession to murder. We now consider whether that statement was sufficiently trustworthy to have met the level of trustworthiness required by our rule for the confession to be admissible as a statement against penal interest. Initially, it should be pointed out that for a statement to be admissible it does not have to be absolutely trustworthy. If this were the requirement, the province of the jury as the finder of fact and weigher of credibility would be entirely invaded.

---

[1] Justice Holmes noted in his oft-quoted dissenting opinion in *Donnelly* v. *United States*, 228 U.S. 243, 277–78, 33 S. Ct. 449, 57 L. Ed. 820 (1913): "The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that Donnelly did not commit the crime. . . . The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law . . . [T]he exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man . . . and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight."

"[W]e would not read the standard of trustworthiness as imposing a standard so strict as to be utterly unrealistic. Even in *Donnelly* [v. *United States,* 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913)] and *Chambers* [v. *Mississippi,* 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)] the evidence, while strongly corroborated, could have been disbelieved by the jury." *United States* v. *Barrett,* 539 F.2d 244, 253 (1st Cir. 1976).

Unlike *DeFreitas,* supra, where there was virtually no showing of trustworthiness regarding the claimed confessions of the only unavailable declarant,[8] here there are numerous factors tending to show trustworthiness.

As to the trustworthiness of the Sanford confession to Bourassa that he was "sorry he had to kill Rhoda," we commence with a consideration of the factors enumerated in *Chambers* v. *Mississippi,* supra, 300–301. "First, each of McDonald's [the declarant's] confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case—McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale, each confession here was in a very real sense self-incriminatory and unquestionably against interest. . . . Finally, if there was any question

[8] We described the Robichaud statements against interest as "clearly untrustworthy" in *State* v. *DeFreitas,* Conn. (41 Conn. L.J., No. 28, pp. 1, 8) (1980).

about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury." (Footnote omitted.)

Courts have taken from *Chambers* four general considerations for determining trustworthiness: "(1) the time of the declaration and the party to whom the declaration was made; (2) the existence of corroborating evidence in the case; (3) the extent to which the declaration is really against the declarant's penal interest; (4) the availability of the declarant as a witness." *United States* v. *Guillette,* 547 F.2d 743, 754 (2d Cir. 1976), cert. denied, 434 U.S. 839, 98 S. Ct. 132, 54 L. Ed. 2d 102 (1977). See *United States* v. *Oropeza,* 564 F.2d 316, 325 (9th Cir. 1977); *State* v. *DeFreitas,* supra, 8; *Henson* v. *United States,* 399 A.2d 16, 19 (D.C. App. 1979); *People* v. *Foster,* 66 Ill. App. 3d 292, 294, 383 N.E.2d 788 (1978).

Although, as we noted in *State* v. *DeFreitas,* supra, 9 n.11, "no single factor in the test we adopt for determining the trustworthiness of third party declarations against penal interest is necessarily conclusive," the following factors here demonstrate that the Sanford statement to Bourassa met the threshold level of trustworthiness.

We commence with an examination of the first factor enumerated above—the time of the declaration and the party to whom it was made. The statement was made within three months after the Pasternak murders, which is relatively close to the time the crimes occurred. Compare *United States* v. *Satterfield,* 572 F.2d 687 (9th Cir.), cert. denied, 439 U.S. 840, 99 S. Ct. 128, 58 L. Ed. 2d 138 (1978) (confession made two years after the crime). Also, the statement was made to a friend whom the

declarant, himself, had contacted. Compare *Lowery* v. *State*, 401 F. Sup. 604 (D. Md. 1975), aff'd without opinion, 532 F.2d 750 (4th Cir.), cert. denied, 429 U.S. 919, 97 S. Ct. 312, 50 L. Ed. 2d 285 (1976) (affidavit sworn to before prison official).

Additionally, regarding the second factor, a myriad of corroborating circumstances were present which were indicative of reliability. The Sanford confession was made spontaneously; compare *Lowery* v. *State*, supra (spontaneity is an indicium of reliability and declarant's affidavit sworn to before prison official not spontaneous); and was not induced by Gold. See *United States* v. *Satterfield*, supra, 693; *People* v. *Lettrich*, 413 Ill. 172, 108 N.E.2d 488 (1952). The statement was made at the time Sanford was contemplating suicide and, in fact, on the very evening he made the confession to Bourassa he took his own life. It does not appear that there was any motive for Sanford to exculpate Gold, inasmuch as no connection between these two individuals was shown or suggested. Compare *State* v. *Higginbotham*, 298 Minn. 1, 5, 212 N.W.2d 881 (1973) (declarant lived with the defendant's family, was often referred to as the defendant's brother, and was likely to have fabricated the confession out of a desire to free his close friend). Sanford, however, apparently believed he had a reason to "get" Pasternak. He thought that Pasternak was representing his wife, Glorianna, and that he was taking advantage of her.[9] Yashenko testified that he overheard the confession on an extension telephone. Compare *People* v. *Craven*, 54 Ill. 2d 419, 429, 299 N.E.2d 1 (1973) (declaration heard only by woman

[9] Sanford had told Morrison: "The bastard [Pasternak] is representing my wife. He's telling her things and I think he's gonna sell her out. . . . [and that if she] didn't get what she had coming to her from this hearing, that he would get the no good Jew bastard one way or the other." At the time of his murder, Pasternak was a practicing attorney in the city of Waterbury.

living with defendant). There is no indication that the statement might have been made to curry favor with the authorities. Compare *United States* v. *Love,* 592 F.2d 1022 (8th Cir. 1979). See also Notes of the Advisory Committee on Proposed Rules, at 28 U.S.C.A. Fed. R. Evid. 804, reprinted in 4 Weinstein, Evidence, p. 804–24 (a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest). Cf. *United States* v. *Rogers,* 549 F.2d 490, 498 n.8 (8th Cir. 1976) (recognizing that declarant's interest in obtaining a lesser sentence for his cooperation could have affected the reliability of the statement where statement made after guilty plea and before sentencing).

Further, other corroborating circumstances exist. Dorothy Crocco placed Sanford in the vicinity of the crime, identifying him as the man she had seen running from the direction of the Pasternak home shortly after the murders. Compare *United States* v. *Guillette,* supra, 754 (no independent evidence such as reports of eyewitnesses placing declarant in vicinity of victim's home at time of crime). According to testimony by Bourassa and Yashenko, Sanford was in the state the day of the murders, and was absent from his home at the approximate time of these crimes. Thus, Sanford had an opportunity to commit the murders. Both Bourassa and Yashenko testified that they were shown a bloody blue denim shirt by Sanford's wife when they returned to Sanford's home later in the evening of the Pasternak murders. Glorianna Sanford testified that she and Sanford drove to Florida the day after the Pasternak murders. Flight may justify an inference of guilt. *State* v. *Piskorski,* Conn. (40 Conn. L.J., No. 51, pp. 1B, 15B) (1979). Finally,

as in *Chambers,* supra, there were statements made to other persons in which Sanford implicated himself in the crimes. He told Morrison that he "would get" Pasternak, and, approximately four hours after the murders, told her that he was in a phone booth, was covered with blood, and had "just done something that he wasn't gonna be able to get out of." The morning after the Pasternak murders Sanford told Borrelli that he "was squaring away [with] people that were fucking with his wife" and that he knew some people who could use more stitches than he had on his neck. These statements were, and are, relevant in determining whether the confession, which was indisputably a declaration against penal interest, was trustworthy.

Regarding the third factor, the extent to which the declaration is against the declarant's penal interest, we note that the confession to the murder of Rhoda Pasternak could not have been more against Sanford's penal interest. Although application of the fourth factor, availability of the declarant as a witness, does not bolster the reliability of the confession inasmuch as Sanford was unavailable at the time of the trial, other circumstances delineated above clearly indicate the trustworthiness of the confession. Fed. R. Evid. 804 (b) (3).

In cases in which exclusion of a declaration against penal interest exculpatory to the defendant did not constitute error, the showing of trustworthiness was significantly less substantial than it was here. For example, in *United States* v. *Guillette,* supra, 754, the court noted that the statement was made to a police informant whom the declarant had just met and with whom he was drinking; that the declarant had had a number of drinks before making the statement; that there was no independent evidence tying the declarant to the crime; that

there were no reports placing the declarant in the vicinity of the crime; and that the government was unable to locate the declarant. In *United States* v. *Satterfield,* supra, 693, there was a substantial length of time between the crimes, which occurred in 1974, and the declaration, which was made in 1976; there was an "absence" of corroboration for the declarant's version of the crimes; and there was "good reason to believe" that the argument during which certain declarations against interest were made was "staged" by the defendant and the declarant, and that the declarant's other statements against interest also were fabricated. In *Taggart* v. *State,* Ind. , 382 N.E.2d 916 (1978), the Indiana Supreme Court upheld the exclusion of a typewritten confession that was delivered to the defendant's son-in-law by an individual who said that the declarant would sign the statement only if he received $5000, and that he would repudiate the statement in court unless he received the money first. That court noted, "the entire circumstances surrounding the origin of this 'confession' are permeated with indicia of untrustworthiness." Id., 919. In *United States* v. *Hoyos,* 573 F.2d 1111, 1115 (9th Cir. 1978), the court found that the excluded statement was not significantly inculpatory of the declarant; that it was not spontaneous and was made only after the declarant's arrest; and that it was made only to the declarant's wife. In *United States* v. *Hughes,* 529 F.2d 838, 840–41 (5th Cir. 1976), exclusion of a statement against interest was not found to constitute a denial of due process because, unlike the *Chambers* case, the defendant there was not directly prevented from cross-examining the declarant defense witness because he never sought to treat him as an adverse witness; there was no independent evidence corroborating the substance

of the declarant's prior statements; and the statements were not necessarily exculpatory in that they may only have shown that the declarant and defendant were accomplices.

On the other hand, cases in which exclusion of the declaration against penal interest exculpatory to the defendant was found to have constituted error demonstrate a level of trustworthiness considerably more proximate to that in the present case. For example, in *United States* v. *Goodlow,* 500 F.2d 954, 958 (8th Cir. 1974), the circumstances showing the trustworthiness of the statements included the facts that two witnesses in addition to the defendant were prepared to testify that they heard the declarant make the statements; that each of these witnesses specified the time and place at which the statements were made and identified the persons who were present; that the car involved in the crime belonged to the declarant's sister; that a police officer testified that the declarant was "known" for the type of crime with which the defendant was charged; and that the several discrepancies in the government informant's identification of the defendant made it "at least plausible" that the declarant and not the defendant committed the crime. See also *United States* v. *Thomas,* 571 F.2d 285, 289 (5th Cir. 1978); *United States* v. *Benveniste,* 564 F.2d 335, 339–42 (9th Cir. 1977); *United States* v. *Atkins,* 558 F.2d 133, 135 (3d Cir. 1977).

In conclusion, we hold that the exclusion of the Bourassa testimony regarding Sanford's confession was in violation of our statement against penal interest exception to the hearsay rule because the corroborating circumstances clearly indicate that the confession was trustworthy. In view of this holding we need not consider whether the exclusion of this evidence deprived the defendant of his con-

stitutional right to due process of law.[10] "We thus follow the recognized policy of self-restraint and the basic judicial duty to eschew unnecessary determinations of constitutional questions. *Pepin* v. *Danbury*, 171 Conn. 74, 88, 368 A.2d 88 [1976]. See also *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568–73, 67 S. Ct. 1409, 91 L. Ed. 1666 [1947]; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346–47, 56 S. Ct. 466, 80 L. Ed. 688 [1936] (Brandeis, J., concurring). See generally A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962)." *Negron* v. *Warden*, Conn. (41 Conn. L.J., No. 39, pp. 1, 5–6) (1980). Where an evidentiary error not of constitutional dimension is found, the defendant must show that the error was harmful. See *State* v. *Sorbo*, 174 Conn. 253, 257, 386 A.2d 221 (1978); *Aillon* v. *State*, 168 Conn. 541, 547–48, 363 A.2d 49 (1975); *State* v. *L'Heureux*, 166 Conn. 312, 323–24, 348 A.2d 578 (1974). We conclude that the defendant has met that burden here.

b. Other Statements Against Penal Interest

To reiterate, Morrison testified during the offer of proof that Sanford had telephoned her two nights before the murders and told her that he "would get" Pasternak. Additionally, on the night of the murders he called her to tell her that he needed her help, and that he had just done something he was not going to be able to get out of. He also said that

[10] We noted in *State* v. *Mastropetre*, 175 Conn. 512, 520, 400 A.2d 276 (1978), " 'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.' *Chambers* v. *Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)."

Exclusion of testimony which does not come within our exceptions to the hearsay rule nonetheless may violate due process. *Green* v. *Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1979).

he was in a phone booth and was covered with blood. Borrelli, a member of a motorcycle club Sanford rode with, testified that the morning after the Pasternak murders he saw Sanford with stitches on his throat. Sanford, when asked by Borrelli what he had been doing, replied that he was "squaring away [with] people" who were bothering his wife; he also stated that he knew some people who could use more stitches than he had. At trial the grounds urged for admissibility were that the statements constituted exceptions to the hearsay rule in that they were declarations against penal interest and were dying declarations. The defendant also claimed that the statement to Morrison that he "would get" Pasternak was admissible either under *State* v. *Hawley,* 63 Conn. 47, 27 A. 417 (1893), as a threat, or under the state of mind exception to the hearsay rule pursuant to which a declaration indicating a present intention to do an act in the future is relevant to show that the act probably was done as planned.[11] On appeal the defendant has argued primarily that the statements were against penal interest.

This is the first case in which this court has been faced with defining a statement against penal interest and with deciding whether a particular declaration other than a confession comes within this exception to the hearsay rule.

McCormick notes, "[a]s to what is against penal interest, quite obviously the essential characteristic is exposure to risk of punishment for crime. Thus either a direct admission of guilt or an admission of implicating circumstances suffices." (Footnote omitted.) McCormick, Evidence § 278, p. 83 (1979

[11] At trial the defendant cited *State* v. *Journey,* 115 Conn. 344, 161 A. 515 (1932), in support of this theory. In *Journey,* testimony by the wife of the decedent that her husband had told her when he left their home that morning that he was going to work for the defendant was admissible to prove that he acted accordingly.

Sup.). Federal rule 804 (b) (3) defines a statement against penal interest as "[a] statement which . . . at the time of its making . . . so far tended to subject him [the declarant] to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." This rule, in referring to statements that *tend* to subject the declarant to criminal liability, encompasses those disserving statements by a declarant that would have probative value in a trial against him. *United States* v. *Thomas,* 571 F.2d 285, 288 (5th Cir. 1978). Thus, a statement has been found to have met this standard where a reasonable person would have realized that remarks of the sort attributed to the declarant—" 'No, Buckey [Barrett] wasn't involved. It was Buzzy'—strongly implied his personal participation in the . . . crimes and hence would tend to subject him to criminal liability. Though by no means conclusive, the statement would be important evidence against [the declarant] were he himself on trial for the . . . crimes." *United States* v. *Barrett,* 539 F.2d 244, 251 (1st Cir. 1976). See also *United States* v. *Alvarez,* 584 F.2d 694, 700 (5th Cir. 1978). (The declarations were against penal interest because they " 'strengthened the impression that [the declarant] had an insider's knowledge of the crimes.' ")

Several states have adopted the broad definition of statement against penal interest contained in rule 804 (b) (3) of the Federal Rules of Evidence or a definition of similar breadth. *Commonwealth* v. *Keizer,* Mass. , 385 N.E.2d 1001 (1979); see also Ark. Stat. Ann. § 28-1001, Rule 804 (b) (3); Cal. Evid. Code § 1230 (Deering); Me. Rev. Stat. Ann. tit. 14, Rule 804 (b) (3); N.J. Stat. Ann. § 2A:84A, Rule 63 (10); N.M. Stat. Ann., Court Rules, Rule 804 (b) (4); Wis. Stat. Ann. § 908.045

(4) (West). We are persuaded of the logic and soundness of the federal rule and the trend to reject a narrow and inflexible definition of a statement against penal interest in favor of a definition which includes not only confessions, but other remarks which would tend to incriminate the declarant were he or she the individual charged with the crime. Where a statement is exceedingly inculpatory, but falls short of being a confession, we cannot say that the statement is, therefore, so inherently untruthful as to be always withheld from the jury's consideration.[12]

This court now rules that a statement against penal interest is one which at the time it is made so far tends to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true. In *State* v. *DeFreitas,* supra, 8, we noted that "[i]n requiring that the trustworthiness of a third party declaration against penal interest be examined carefully . . . the rule we adopt is in accord with the Federal Rules of Evidence . . . ." (Footnote omitted.) Here, we go a step further and adopt the definition of statement against penal interest contained in the Federal Rules of Evidence.[13]

[12] Further, although statements other than confessions may constitute declarations against penal interest, we stated in *State* v. *DeFreitas,* Conn. (41 Conn. L.J., No. 28, pp. 1, 8) (1980), that a factor for determining whether a statement against penal interest meets the threshold level of trustworthiness required by our rule is the extent to which a statement is really against the declarant's interest. Obviously a confession is more against a declarant's interest than is a statement which is not a confession, and, hence, would more readily meet the threshold level of trustworthiness required.

[13] Federal Rules of Evidence, rule 804, provides in relevant part: ". . . (b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (3) Statement against interest.—A statement which was at the time of

We find that the Sanford statements to Morrison and Borrelli fall squarely within the definition of statement against penal interest that we have now adopted. The admissibility of these statements, however, depends on whether they meet the threshold level of trustworthiness which we discussed at length in the preceding section of this opinion. The statements to Morrison, a friend of some twenty years, were made spontaneously by Sanford when he telephoned her both two nights before and on the very night of the murders. The strong corroborating evidence, discussed above, clearly indicates the trustworthiness of the statements. Additionally, although falling short of a confession, the statements were exceedingly inculpatory to Sanford, such that a reasonable person would not have made them unless he or she believed them to be true. We find that these statements meet the threshold level of trustworthiness required of statements against penal interest.

Likewise, the statement to Borrelli meets the threshold level of trustworthiness. Borrelli was a member of the same motorcycle club as Sanford, and the statement was made the day following the murders. Again, the numerous corroborating circumstances clearly indicate the trustworthiness of this statement.

As to all of the above declarations against penal interest, the trial court considered the issue of trust-

---

its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject h'm to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

worthiness and decided that the corroborating circumstances did not clearly indicate the trustworthiness of the statements; accordingly, it ruled that all the declarations were not admissible. For the reasons set forth above, we disagree and conclude that the trial court abused its discretion. We find error and order a new trial.

Our holding is dispositive of this appeal; however, we give consideration to certain of the defendant's other claims of error which are likely to arise upon retrial.

II

Matters Likely to Arise on Retrial

A. SANFORD-RELATED NONHEARSAY

During the offer of proof, nonhearsay evidence was elicited which was claimed to link Sanford to the murders. This included testimony regarding a bloody shirt seen in Sanford's home the night of the murders; testimony by Crocco identifying Sanford as the man she saw running from the vicinity of the Pasternak home shortly after the murders; and evidence of Sanford's sudden departure for Florida the day after the murders. All Sanford-related evidence which the trial court did not exclude on hearsay grounds it excluded as having "no relevancy."

"No precise and universal test of relevancy is furnished by the law, and the question must be determined in each case according to the teachings of reason and judicial experience. *Eason* v. *Williams,* 169 Conn. 589, 591, 363 A.2d 1090 [1975]; *State* v. *Towles,* 155 Conn. 516, 523, 235 A.2d 639 [1967]." *State* v. *Runkles,* 174 Conn. 405, 413, 389 A.2d 730, cert. denied, 439 U.S. 859, 99 S. Ct. 177, 58 L. Ed. 2d 168 (1978). We have noted that " 'Evidence is admissible when it tends to establish a fact in issue

or to corroborate other direct evidence in the case. One fact is relevant to another fact whenever, according to the common course of events, the existence of the one, taken alone or in connection with other facts, renders the existence of the other either certain or more probable. Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of the issue. . . . *State* v. *Towles,* 155 Conn. 516, 523, 235 A.2d 639 [1967]; *Pope Foundation, Inc.* v. *New York, N.H. & H.R. Co.,* 106 Conn. 423, 435, 138 A. 444 [1927].'" *State* v. *Villafane,* 171 Conn. 644, 674–75, 372 A.2d 82 (1976), cert. denied, 429 U.S. 1106, 97 S. Ct. 1137, 51 L. Ed. 2d 558 (1977).

Although a court has wide discretion in its rulings on the relevancy of evidence; *State* v. *Carr,* 172 Conn. 458, 464, 374 A.2d 1107 (1977); we conclude that the trial court abused its discretion in finding irrelevant all nonhearsay evidence linking Sanford to the crimes. Of particular concern is the exclusion of the testimony of Dorothy Crocco that she saw a man whom she identified as Sanford "running like the devil" from the vicinity of the Pasternak residence at the time police cars were arriving at the scene. Given all the other testimony offered to link Sanford with the murders, the trial court erroneously ruled this evidence irrelevant, thereby implicitly concluding that this identification testimony did not render "more probable" the fact that Gold was not guilty of the Pasternak murders. See *State* v. *Villafane,* supra, 675. "'[I]t is always competent for a [defendant] to give evidence tending to show that another committed the crime [with] which he is charged . . . .'" *State* v. *Marshall,* 166 Conn. 593, 601, 353 A.2d 756 (1974).

The state claims that the Crocco identification

of Sanford was "absolutely compromised" because although Sanford had a mustache and goatee both before and immediately after the murders, Crocco had testified that the man she saw running did not have such facial hair. Further, the state notes that although Crocco testified that the man who ran past her had long hair, Sanford had shaved his head bald at the time of the murders. We point out, however, that it is the function of the trier of fact to determine the credibility of witnesses. *State* v. *Holley,* 174 Conn. 22, 28, 381 A.2d 539 (1977). See also *Brooks* v. *Tennessee,* 406 U.S. 605, 611, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972). The Crocco identification provided some evidence which directly connected Sanford with the crimes. Once that evidence was adduced, other evidence concerning Sanford's involvement in the crime became admissible. *State* v. *Kinsey,* 173 Conn. 344, 347–48, 377 A.2d 1095 (1977).

B. SEIZURE OF BUTTONEER KIT

The defendant claims on appeal that the trial court erred in admitting into evidence the buttoneer kit "purportedly" seized from the defendant's apartment by Detective O'Connell of the New York City police department. Upon the request of the Waterbury police department, O'Connell and other New York City police officers had gone to Gold's apartment at about 3 a.m. on October 4, 1974. Gold met the officers at the door and, after being advised of his *Miranda* rights, signed a written consent to search his apartment. The written consent simply stated "I, Murray Gold, of 108–48 70th Road, Apartment 6J, Forest Hills, New York, hereby consent to a search of my premises." O'Connell, however, when asking Gold to sign the consent, told him that the police were "searching for items in connection with the homicide in Waterbury." After Gold signed

the form consenting to the search, he was informed of and shown the search warrant that the New York police already had obtained for shoes with Cat's Paw heels and a suit coat missing a brown button.

While searching Gold's apartment, O'Connell observed a button-fastening kit in the linen closet, which kit contained four brown suit coat buttons similar to the button described in the search warrant application. O'Connell removed the buttoneer kit from the defendant's linen closet, took it into the hallway outside Gold's apartment, and while the door to the apartment was open, showed it to Sergeant Messina of the Waterbury police department who had been waiting in the hallway during the search of the apartment by the New York police. After the kit was examined by Messina, O'Connell returned it to the defendant's linen closet. Subsequently, the New York police obtained a second warrant which authorized the seizure of the buttoneer kit, and, pursuant to that warrant, the kit was seized.

First, the defendant claims that the search warrant for the shoes and suit coat was only a guise for admission into the Gold apartment and that the search was violative of the fourth amendment to the United States constitution under *Coolidge* v. *New Hampshire,* 403 U.S. 443, 471, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), because, although the kit was not named in this search warrant, the presence of the Waterbury police officer permitted the New York police to "know in advance" what they would seize. The defendant's second theory is that although "mere evidence" is subject to seizure under *Warden* v. *Hayden,* 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967), the seizure of the buttoneer kit by O'Connell was unconstitutional because there was no nexus between the kit and criminal behavior

at the moment it was seized, but, rather, only after the seizure when the kit was shown to Messina. Thirdly, the defendant claims that the New York police exceeded the consent given by Gold to search his apartment by showing the buttoneer kit to Messina in the hall outside Gold's apartment; the claim is that the defendant's waiver of his right to privacy extended only to the New York police, but not to the Waterbury police. On the ground that the warrant subsequently issued authorizing seizure of the buttoneer kit was a "fruit of the poisonous tree," the defendant claims that it should have been suppressed under *Wong Sun* v. *United States,* 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The defendant's first claim, that the seizure was illegal under *Coolidge* v. *New Hampshire,* supra, may be readily rejected. In that case, the state's contention that the seizure of an automobile was justified on the grounds of the "plain view" exception to the warrant requirement was rejected by the court because the police had sufficient opportunity to secure a warrant; they knew the automobile's exact description and location well in advance of the seizure, and had intended to seize it; and the case did not involve contraband, stolen goods, or objects dangerous in themselves.[14] *Coolidge* v. *New Hamp-*

[14] In *Coolidge* v. *New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), the court noted (p. 471): "If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of 'Warrants . . . particularly describing . . . [the] things to be seized.' The initial intrusion may, of course, be legitimated not by a warrant but by one of the exceptions to the warrant requirement, such as hot pursuit or search incident to lawful arrest. But to extend the scope of such an intrusion to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure." (Footnote omitted.)

shire, supra, 472. Here, there is no indication that when the New York police entered Gold's home at approximately 3 a.m. they had any inkling that a buttoneer kit would be located therein. That Messina was waiting in the outside hall does not alter this fact in the slightest.

The second contention, that the New York police seized the buttoneer kit before they became aware of its potential worth as "mere evidence" is also without merit. We note that the New York police were legally in the Gold apartment and were conducting a lawful search. They had obtained a search and seizure warrant, the validity of which has not been challenged. They also had obtained Gold's consent to search the apartment; the voluntariness of that consent has not been attacked. See *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *State* v. *Chetcuti,* 173 Conn. 165, 171–72, 377 A.2d 263 (1977). The buttoneer kit was lawfully discovered during the search. Lawful discovery alone, however, does not provide a legal basis for the seizure of an item. Were this the law, police would be empowered to make wholesale seizures of innumerable items. Such wholesale seizures "would unquestionably violate the Fourth Amendment." 2 LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 6.7, p. 477. (Footnote omitted.) Rather, there must be a connection—a nexus—between the items seized and criminal activity. *Warden* v. *Hayden,* 387 U.S. 294, 307, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967). "[I]n the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Warden* v. *Hayden,* supra, 307. See also *State* v. *DeChamplain,* Conn. (41 Conn. L.J., No. 32, pp. 1, 4) (1980); 1 LaFave, Search and Seizure, supra, § 2.6 (d), p. 390; 2 LaFave, Search

and Seizure, supra, §§ 4.1 (b), p. 7, and 8.1, p. 630.

The defendant claims the seizure was invalid because probable cause to believe that the buttoneer kit was "mere evidence" did not exist until the kit was shown to Messina. We assume, arguendo, that the defendant is correct in his contention that the seizure occurred prior to the time at which the buttoneer kit was shown to Messina who was standing in the hallway.[15] We reject, however, his claim that probable cause that the kit constituted "mere evidence" did not exist prior to this point.

As we noted above, when the New York police arrived at the Gold apartment they had in their possession a warrant to search the premises and to seize "a pair of shoes, consisting of half soles and cats paw heels, [and] a suit coat with a button torn away." Attached to this warrant was an affidavit which set forth the details of the Pasternak murders and certain information linking Gold with these crimes. The affidavit stated that "[a]dditional evidence at the scene of the murder consists of a suit coat button, brown in color. This button does not match any item of clothing at the Pasternak home." When the New York police officers arrived at Gold's apartment they knew that a brown suit coat button matching the one found at the murder scene could be of great assistance in solving the crimes. Thus, when they first came upon the buttoneer kit containing four brown suit coat buttons

[15] It appears to us, however, that a broad consent to search would, in most instances, imply a consent to touch and move in a reasonable manner certain objects. For example, consent to search a room for a coat would imply, absent a limitation on such consent, a consent to open a partially closed closet door and to move aside other garments to search for the coat in issue. Such action would not generally mean that the closet door and other garments had been seized. See 2 LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 8.1, p. 625.

of the type described in the affidavit, they had probable cause to believe that the buttoneer kit did constitute "mere evidence." The fact that the kit was shown to Messina in the hallway does not affect the validity of the prior seizure. Nor does the fact that the New York police returned the kit to the linen closet and, exercising caution, subsequently sought and obtained a warrant authorizing the seizure of the buttoneer kit in any way undermine the initial valid seizure.

The third claim of the defendant, that the New York police exceeded the consent given by Gold to search his apartment by showing the buttoneer kit to Messina in the hallway is also without merit. Once the New York police had validly seized the kit, they were not barred from showing it to other individuals who could assist in establishing whether the item seized was, in fact, evidence which would link a particular suspect to the crimes.

C. IN-COURT IDENTIFICATION

Kim (Kelly) Perugini[16] made an in-court identification of Murray Gold as being the man she saw in a car which was parked on Fern Street, Waterbury, and which was facing toward the Pasternak home at 7:20 a.m. on September 23, 1974, three days before the Pasternak murders. The defendant claims that the trial court's denial of his motion to suppress the in-court identification deprived him of due process, because this identification was tainted by a suggestive pretrial photographic identification procedure. The error is claimed to be harmful because the in-court identification placed the defendant at the scene of the crimes shortly before the murders and contradicted a statement

[16] Kim Perugini married prior to the trial and therefore is referred to in the transcript as Kim Kelly.

that O'Connell had testified Gold made to him in which Gold asserted that he visited Waterbury only on September 16, 1974.

During a hearing outside the presence of the jury, Perugini testified, inter alia, to the following: In September of 1974 she lived on Fern Street in Waterbury. At about 7:20 a.m. on the morning of September 23, 1974, she left her house to drive to school. As she walked down the driveway she noticed that a man was sitting in a car which was facing her car. She described the car as being dark, big, and blue, and described its occupant as being a man with a bushy mustache, very dark hair, and a receding hairline. This dark blue car was parked one foot or less from the front of her car. The day was fair and it was light. The windshields of both cars were clear. She sat facing and observing the man for about two minutes while she warmed up her car.

On October 17, 1974, approximately three weeks after Perugini saw the man in the dark blue car, three Waterbury police officers took a photographic display to her home. The court file contains the display which shows ten individual photographs of white males with mustaches, which photographs were arranged in two rows, each row containing five pictures. Only the defendant's photograph had an "inked-in" mustache. One male also had a beard. All the photographs were of approximately the same size. Although the backgrounds of the photographs ranged from white to grey, there were several photographs having backgrounds of approximately the same light shade as that of the defendant's photograph. The photograph of the defendant was the only one having a height measuring scale on it.

Perugini testified further during this hearing that she had looked at the display for approximately seven to ten minutes before selecting the photograph of the defendant, beneath which she printed "K. Perugini." Perugini testified that the police did not suggest in any way that she select any particular photograph, but, only asked her if the photograph of the man she saw in the car was among those on the display. Perugini responded affirmatively on three separate occasions when asked if her in-court identification was based upon her memory of the man she saw in the car on September 23, and was not influenced by the photographs she was shown. Further, she testified that although she noticed that the mustache on the defendant's photograph was "inked-in," this did not play any part in her identifying that photograph. Perugini further indicated that she did not notice the scale behind the defendant in his photograph when she was shown the photographic display.

Over the defendant's objection, the trial court, having found that this identification was based not on the photographic display, but on her recollection of the man she saw on September 23, admitted Perugini's in-court identification of the defendant. An exception was duly taken.

The danger of misidentification of a suspect by a witness, present even if the police follow the most correct photographic identification procedure, is increased where, for example, police show the witness a display of several pictures among which the photograph of a single individual is in some way emphasized. *Simmons* v. *United States,* 390 U.S. 377, 383, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); *State* v. *Hafner,* 168 Conn. 230, 238, 362 A.2d 925,

cert. denied, 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74 (1975). The problem is that where there is an initial misidentification, the witness is subsequently likely to retain in his or her memory the image of the photograph rather than of the person actually see[illegible] *Simmons* v. *United States,* supra, 383.

Thus, in assessing the admissibility of in-court identification testimony, reliability is the "linchpin." *Manson* v. *Brathwaite,* 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *State* v. *Piskorski,* Conn. (40 Conn. L.J., No. 51, pp. 1B, 22B) (1979). Reliability is to be determined by the totality of the circumstances as emphasized in *Stovall* v. *Denno,* 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967) and *Neil* v. *Biggers,* 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). *State* v. *Piskorski,* supra, 22B.

Because the photograph of the defendant was the only one in which a mustache had been drawn in, it was unnecessarily suggestive. It was unnecessary because the police readily could have included in the display other photographs with mustaches drawn on them. It was suggestive because the police showed the witness pictures of several individuals among which the photograph of a single individual—Gold—was emphasized. See *State* v. *Hafner,* supra, 238; see also *Simmons* v. *United States,* supra, 383. "'A procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police.'" *People* v. *Hunt,* 19 Cal. 3d 888, 894, 568 P.2d 376 (1977), quoting *People* v. *Slutts,* 259 Cal. App. 2d

886, 891, 66 Cal. Rptr. 862 (1968).[17] Where a feature is placed on the defendant's photograph in order to make the picture conform to the witness' description of the criminal he or she had seen, the identification proceeding has been held to have been rendered highly suggestive. *People* v. *Slutts,* supra; annot., 39 A.L.R.3d 1000, 1013. Even where the subsequent in-court identification has been held to have been admissible because it had an independent origin, such sketching on a photograph has been specifically mentioned as an identification procedure "not to be commended." *People* v. *Rodgers,* 53 Ill. 2d 207, 213, 290 N.E.2d 251 (1972). We agree.

In determining the admissibility of an in-court identification, however, we must consider other factors in addition to the unnecessary suggestiveness of a prior identification procedure. These factors " 'include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.' *Manson* v. *Brathwaite,* supra, 114 (citing *Neil* v. *Biggers,* supra, 199–200)." *State* v. *Piskorski,* supra, 22B.

Application of the above factors to the circumstances present in this case reveals that the trial court did not err in determining that the in-court

[17] Courts have distinguished between cases in which the sketching in of the feature occurred before the witness selected a particular picture; *People* v. *Slutts,* 259 Cal. App. 2d 886, 891, 66 Cal. Rptr. 862 (1968); and where the witness already had selected a picture in accordance with permissible procedures and the drawing in of a feature was used as a confirmatory tool. *Ash* v. *United States,* 313 F. Sup. 961, 965 (D.D.C. 1970); *People* v. *Slutts,* supra.

identification was independent of the pretrial photographic identification procedure and was based on what Perugini had seen the morning of September 23. While the cars were almost bumper to bumper during the early daylight hours of a clear day, Perugini had an unobstructed view of the man in the dark blue car for approximately two minutes. Her attention was focused on the man because she testified that during this two-minute interval she stared at him and he stared at her. This is not a situation where the identifying witness was under emotional stress at the time of the crime. The description that she gave to police before the photographic identification procedure, that the man had a "bushy mustache, very dark hair, and a receding hairline," although somewhat sketchy, does accurately describe the defendant. Further, at no time during either the hearing outside the presence of the jury or during her testimony at trial did Perugini evidence any uncertainty about whether the man whose photograph she identified was, in fact, the individual she had seen in the car on September 23. Finally, the witness' pretrial photographic identification of Gold occurred only approximately three weeks after she had seen the man.

Balanced against the above factors, under the totality of the circumstances, the "corrupting effect" of the suggestive pretrial photographic identification itself did not have such a tendency to give rise to a substantial likelihood of irreparable mistaken identification that the in-court identification had to be excluded. *Simmons* v. *United States,* supra, 384; *State* v. *Williams,* 173 Conn. 545, 552, 378 A.2d 588 (1977).

The trial court did not err in its conclusion that the state had met its burden of establishing that the

in-court identification was based upon observation independent of the suggestive pretrial identification procedure.

D. REMARKS OF THE STATE'S ATTORNEY DURING FINAL ARGUMENT

The defendant claims that the trial court erred in denying his motion for a mistrial based on certain comments made by the state's attorney during final argument.

The state's attorney concluded his final argument with the following statement: "Now, when Mr. Kunstler says to you you'll wake up screaming if you return the verdict of guilty, I say to you you'll wake up screaming if you return a verdict of not guilty, because to do good to the bad, the spirit of the bad, is to do evil to the good and make you responsible, you, yes, you, for all the acts this man may subsequently commit, because you let him go free. Thank you for your attention."[18]

Defense counsel moved for a mistrial on the basis of the above comments; the trial court denied the motion, and an exception was taken. No specific cautionary instruction was subsequently given the jury regarding the above remarks.

We have previously cited with approval ABA, Standards Relating to the Prosecution Function and the Defense Function § 5.8 (1971); *State* v. *Carr*, 172 Conn. 458, 470, 374 A.2d 1107 (1977);

[18] For clarification purposes we note that Mr. Kunstler's remarks as indicated in the transcript are as follows: "But if you have a reasonable doubt, you must stand firm or you will wake up screaming some night."

subsection (d) of which provides as follows: "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict."

The state's attorney improperly argued the necessity of preventing further injury to society by the defendant himself. A defendant is on trial for what has been done and not for what he or she might do. *State* v. *Raspberry,* 452 S.W.2d 169, 172 (Mo. 1970); *State* v. *Mobley,* 369 S.W.2d 576, 581 (Mo. 1963). Also, by threatening that a verdict of not guilty would make "you responsible, you, yes, you, for all the acts this man may subsequently commit, because you let him go free," the state's attorney even further diverted the jury from its duty to decide the case solely on the evidence.

III

Conclusion

Trustworthy declarations against penal interest exculpatory to a defendant are admissible if the declarant is unavailable. In *State* v. *DeFreitas,* supra, we adopted the same standard of trustworthiness as is required by rule 804 (b) (3) of the Federal Rules of Evidence. Here, we go a step further and adopt a definition of statement against penal interest which is the same as that contained in this federal rule.

For the reasons set forth above, the offered statements of Bruce Sanford met all the requirements of our rule regarding declarations against penal interest.

There is error, the judgment is set aside and a new trial is ordered.

In this opinion the other judges concurred.